



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

Matter of: RCA Service Company

File: B-219406.2

Date: September 10, 1986

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### DIGEST

1. Agency properly rejected its source selection official's recommendation for award where source selection official's recommendation was inconsistent with the evaluation factors established by the solicitation.

2. Where protester would not have received award under RFP's original evaluation criteria, protester has not been competitively prejudiced by amendment which, among other things, changes RFP's evaluation criteria and allows protester a second chance to compete for award.

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### DECISION

RCA Service Company (RCA) protests the Department of Commerce's (Commerce) rejection of the award recommendation made by its source selection official (SSO) under the National Oceanic and Atmospheric Administration (NOAA) request for proposals (RFP) No. WASC-84-00054. RCA also protests the agency's subsequent amendment of the RFP, resulting in the submission of revised technical and cost proposals and reopening of negotiations. For the reasons set forth below, we deny the protest.

### BACKGROUND

This solicitation was issued on October 3, 1984, for the operation, maintenance and technical support of the NOAA Satellite Command and Data Acquisition Station in Fairbanks, Alaska. The station's primary mission is to meet the command, telemetry, data acquisition, data transmission and data distribution requirements of certain polar-orbiting meteorological satellites. The solicitation contemplated award of a cost-plus-award-fee contract for 1 year, with four 1-year options.

Commerce received proposals from four offerors. After negotiations and evaluations, only RCA and Bendix Field Engineering Corporation (Bendix), the incumbent contractor,

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remained in the competitive range. The source evaluation board (SEB) evaluated the final technical and cost proposals of these offerors and recommended that award be made to Bendix. However, the SSO conducted his own review of the best and final offers and recommended award to RCA. The contracting officer requested reconsideration of this decision. The SSO reviewed his choice, but again decided that the award should be made to RCA, and issued a memorandum setting forth his findings to support this determination. The contracting officer then proposed to make award to RCA, based on her conclusion that the SSO considered the two proposals technically equal and the fact that RCA proposed the lower cost.

Bendix protested the proposed award, and on October 31, 1985, our Office sustained the protest on the basis that the SSO had not applied the evaluation criteria properly and that the source selection determination was therefore not supported by the record. See Bendix Field Engineering Corp., B-219406, Oct. 31, 1985, 85-2 CPD ¶ 496. We recommended to Commerce that the source selection be independently reconsidered, consistent with the established evaluation criteria.

Commerce appointed the NOAA Deputy Administrator as the new SSO and instructed him to examine independently the evaluation of the RCA and Bendix proposals in accordance with the evaluation factors established in the RFP. This second SSO reviewed the SEB's source selection recommendation and concluded that there was "no substantive reason to alter the SEB's evaluation factors or the scoring of the bidders." He also noted that section "M" of the RFP, "Evaluation Factors for Award," included the caveats that "offerors should note that award may not be made to the lowest cost proposed. Likewise, award will not necessarily be made for technical capabilities that appear to exceed the Government's minimum requirements for successful performance of the work." The second SSO then concluded that "in that both [offerors] are judged to be technically acceptable, but RCA would be less [costly] over 5 years, I believe it to be in the best interests of the Government to award the contract to RCA." The second SSO's recommendation was rejected by Commerce's General Counsel on the basis that it also deviated from the award standards set out in the RFP which required technical factors to be weighted at 70 percent and cost factors at 30 percent of the total evaluation score. The second SSO was advised by the General Counsel that award based on lower cost alone is improper where, as here, the technical factors of the evaluation criteria are given paramount importance and there is no basis to determine that the technical proposals are essentially equal. The General Counsel acknowledged the

second SSO's belief that award really should be made to the firm which is technically acceptable and which proposes the lowest estimated costs and suggested that "the only proper way to accomplish [this] goal is to revise the evaluation criteria to specifically state that the award decision will be made under that standard."

The agency report indicates that during discussions among the contracting officer, the program office and legal counsel, the following alternatives were considered: (1) to make award in accordance with the original evaluation criteria contained in the solicitation; (2) to amend the solicitation to make some changes in the specifications including changes in the scope of work and to revise the evaluation criteria to place more emphasis on cost; or (3) to cancel the solicitation and reissue with revised specifications and evaluation criteria.

It was determined that the second of these alternatives would best meet the government's needs. Commerce's Administrative Support Center then issued amendment 003 which revised the evaluation criteria, changed the technical-to-cost ratio from the original 70:30 to 1:1 and modified the statement of work required. Bendix is presently providing the services under a contract effective through September 30, 1986.

#### THE SSO's RECOMMENDATION

RCA contends that it is entitled to the award based on the second SSO recommendation and that the General Counsel's opposition to the SSO's award decision represents an error of law. Specifically, RCA alleges that the second SSO found the technical proposals of Bendix and RCA to be technically equal and notes that in these circumstances cost properly becomes the determinative factor. RCA acknowledges that the second SSO did not actually state that the proposals were technically equivalent. However, the protester insists that this conclusion must be inferred. In so arguing, RCA draws upon conclusions made by the first SSO; notes that the explicit use of "technically equivalent" or other term of art is not necessary, notes that exact equality of scores is not required for this finding; and notes the second SSO's reference to the provision in section "M.2" of the RFP that "award will not necessarily be made for capabilities that would appear to exceed those needed for the successful performance of the work."

We find no merit to this argument. RCA is correct in its assertion that, where the agency concludes that proposals are essentially equal technically, price may become the

determinative consideration in making an award notwithstanding that, in the overall evaluation scheme, price was not an important factor. See AFL-CIO Appalachian Council, Inc., B-216878, Apr. 12, 1985, 85-1 CPD ¶ 419. However, we do not agree with RCA's premise that the second SSO made a determination that the proposals of RCA and Bendix were technically equal. On the contrary, the second SSO specifically stated that he found no reason to alter the SEB's scoring of proposals. By accepting the SEB's scores, the second SSO recognized that Bendix's technical proposal merited a substantially higher score than RCA's technical proposal. In fact, the SEB ranked Bendix's technical proposal 34 percent higher than RCA's. Also, the second SSO specifically acknowledged that there was "a difference between the two bidders concerned" and never stated that they were technically equivalent or any other words to that effect. When the second SSO's selection recommendation was challenged by the Commerce General Counsel and he was specifically advised that price could not be the determinative factor under the RFP as written unless the two proposals were considered technically equivalent, the SSO did not respond by stating that he had, in fact, found the proposals to be technically equivalent but had failed only to express it clearly. Rather, he stated that the standard he was applying "[would] satisfy the minimum needs of NOAA" and that he had based his conclusions on the definition of the term "technically acceptable"--not, we note, "technically equivalent." The second SSO did find that both firms were "technically acceptable." However, in our view this only means that both meet the minimum standard for further consideration.

Regarding the language the second SSO quoted from section "M.2" of the RFP (that credit would not necessarily be given for capabilities exceeding the government's needs), we do not agree with RCA's argument that this reference outweighs the SSO's approval of the SEB scores. First, he also quoted section "M.2's" caveat that award would not necessarily be made to the firm offering the lowest cost proposal. Second, we disagree with RCA's contention that section "M.2" implies that no consideration can be given in the evaluation process for proposals offering more than the minimum level of technical ability. This contention suggests an evaluation that recognizes proposals as either technically acceptable or unacceptable, rather than an evaluation system which reflects the relative degree of technical capability offered above the minimum acceptable level. In our view, the language in section "M.2" does not invalidate higher scores awarded under the evaluation criteria, but rather, gives the evaluators the flexibility not to increase technical scores for technical

abilities which exceed the agency's actual needs. Where, as here, a numerical scoring scheme is used to evaluate proposals, technical factors are traditionally scored on the basis of the extent to which the evaluators, in the exercise of their good faith subjective judgments, believe proposals merit perfect or less than perfect ratings. See Francis & Jackson Associates, Inc., 57 Comp. Gen. 244 (1978), 78-1 CPD ¶ 79 at 7; Sheldon K. Kall, B-199120, Sept. 23, 1980, 80-2 CPD ¶ 221 at 7. Finally, it was clear from section "M.1" of the RFP that technical proposals were going to be evaluated on the basis of seven factors which were listed therein along with their relative weights for evaluation purposes. See Bendix Field Engineering Corp., B-219406, supra, 85-2 CPD ¶ 496 at 2-4.

It therefore does not follow that the second SSO's memorandum implied a finding of technical equality, as RCA argues. Rather, it is apparent that the second SSO decided to make his award decision as though the RFP provided that award would be made to the lowest-priced, technically acceptable offeror, even though the RFP indicated that technical factors were worth 70 percent to 30 percent for proposed cost. Such a result clearly disregards the RFP's evaluation criteria. See Kempter-Rossman International, B-220772, Feb. 4, 1986, 86-1 CPD ¶ 127. It simply is not proper for an agency to induce an offer which represents the highest quality and then to reject it in favor of a materially inferior offer on the basis of price. See Applied Financial Analysis, Ltd., B-194388.2, Aug. 10, 1979, 79-2 CPD ¶ 113 at 5. Accordingly, Commerce properly rejected the second SSO's recommendation for award, and this portion of the protest is denied.

#### THE AMENDMENT OF THE RFP

RCA protests that it is prejudiced by the issuance of the amendment, since its price under the original RFP was exposed in connection with the earlier protest. The protester contends that because the requirement is labor-intensive, the only way to effect the significant cost savings RCA had offered was by reducing staffing levels and increasing the efficiency of the use of certain personnel, and through innovative and unique labor agreements. RCA alleges that as a result of the exposure of RCA's price, Bendix has now been able to deduce the basis for RCA's lower costs and to negotiate labor agreements similar to RCA's, effectively neutralizing RCA's competitive advantage in this area. Because of this alleged prejudice, RCA urges that the amendment and reopening of negotiations are improper and should not be allowed.

Since the second SSO's factual findings (resulting in his endorsement of the SEB's technical scoring of the proposals) would, as a practical matter, compel award of the contract to Bendix under the original evaluation criteria, it is apparent that RCA will benefit by the amendment in that it will be given another chance to compete for the award. The amendment establishes new criteria for award. Among other things it calls for evaluation to consider technical factors to be of equal weight to proposed costs. While it may be that both Bendix and RCA have learned information about each other's proposed costs during the earlier protest, we cannot find that RCA, which is getting a second chance to compete for award, has been competitively prejudiced by this action. See KET, Inc.--Request for Reconsideration, B-190983, Jan. 12, 1981, 81-1 CPD ¶ 17 at 6.

The protest is denied.

*Harry R. Van Cleve*

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